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No. 84-1554

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

CLIFFORD W. CARRIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Acting Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether attorney error, based on ignorance or inadvertence that does not constitute ineffective assistance of counsel, nevertheless constitutes "cause" under the "cause and prejudice" standard for excusing a procedural default.

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INTEREST OF THE UNITED STATES

This case raises an important question regarding the proper meaning of the "cause" prong of the "cause and prejudice" standard for excusing a convicted defendant seeking collateral relief from the consequences of a procedural default in failing to raise the particular issue at trial or on direct appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). While this case involves a state prisoner seeking habeas corpus relief under 28 U.S.C. 2254, the "cause and prejudice" standard also applies in collateral attacks by federal prisoners under 28 U.S.C. 2255. *United States* v. *Frady*, 456 U.S. 152 (1982). The Court's decision in this case therefore will govern collateral attacks on federal convictions.

STATEMENT

1. Respondent Carrier was convicted in Virginia state court of rape and abduction. Before trial, his court-appointed attorney sought to obtain copies of all of the victim's statements to the police that contained descriptions of her assailants, the assailants' vehicle, and the location of the

alleged rape. The prosecution turned the witness's statements over to the trial court for in camera inspection, and the court declined to disclose them to the defense on the ground that they contained "no evidence of an exculpatory nature." Immediately before trial, defense counsel again sought to obtain copies of any statements made to the police by the victim and also requested disclosure of statements by an identification witness. After another in camera inspection, the trial court again declined to release the statements because they contained nothing exculpatory. Pet. App. 4-5. Defense counsel excepted to the trial court's ruling "for purposes of the record," relying on this Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), for the proposition that the defense " 'should have the opportunity to actually review[] those statements.' " See Pet. App. 16-18 & nn.5, 6 (Hall, J., dissenting).

Respondent then appealed his conviction to the Supreme Court of Virginia. In the notice of appeal, defense counsel assigned seven errors, one of which was: "Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial and during the course of the trial?" Pet. App. 5. However, counsel did not pursue this discovery claim in his appellate brief. *Ibid.* The Supreme Court of Virginia thereafter denied respondent's petition for appeal (J.A. 4), and this Court denied certiorari. 439 U.S. 1076 (1979).

2. On February 5, 1980, respondent filed a pro se petition for a writ of habeas corpus in state court, alleging that the withholding of the victim's statements violated the Due Process Clause of the Fourteenth Amendment. The Commonwealth moved to dismiss the petition on the ground that the issue had not been pursued on direct appeal.[1] The circuit court granted that motion, and the Virginia Supreme Court denied review (J.A. 7; Pet. App. 5-6).

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[1] Under Virginia law, errors that could have been but were not raised on appeal generally may not be raised for the first time on collateral attack, unless there is a showing of ineffective assistance of counsel in failing to raise the issue on appeal. See *Slayton* v. *Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), cert. denied, 419 U.S. 1108 (1975).

3. In September 1980 respondent filed a pro se petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that he was denied due process because the victim's statements were withheld from defense counsel. By order dated October 15, 1982, the district court dismissed the habeas petition because of respondent's procedural default in failing to preserve this issue on direct appeal (Pet. App. 27-29). In a footnote, the district court noted respondent's contention that the default was due to ineffective assistance of counsel. The court declined to consider the claim of ineffective assistance, however, because respondent had not exhausted his state remedies with regard to it (*id.* at 28 n.*). The court observed that respondent might be able to establish "cause" for his default—presumably referring to the allegation of ineffective assistance of counsel—but that he should attempt to establish such cause in the first instance in the Virginia courts (*ibid.*).

4. a. In an opinion dated December 27, 1983, a divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 3-22). The majority described respondent's claim as one based on *Brady* v. *Maryland*, 373 U.S. 83 (1983), noting respondent's argument that the trial court had erred in denying his request for the victim's statements on the ground that they did not contain "exculpatory" evidence, rather than determining whether they contained evidence that was "material" on the question of guilt. Pet. App. 7 (quoting *Brady*, 373 U.S. at 87).[2] The court acknowledged that respondent had committed a procedural default under Virginia law by not preserving the *Brady* claim on direct appeal (Pet. App. 7-8, 15); it also determined that respondent was not raising an independent claim of ineffective assistance of counsel under the Sixth Amendment based on counsel's failure to preserve the discovery issue on direct

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[2] Of course, the Court made clear in *Brady* that the evidence must be not only "material," but also "favorable to [the] accused" (373 U.S. at 87). See also *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 6. There is no duty to disclose inculpatory evidence. *Weatherford* v. *Bursey*, 429 U.S. 545, 559-560 (1977).

appeal,[3] observing that "with the exception of the unexplained failure to appeal the *Brady* issue, [respondent's] trial lawyer appears to have performed with diligence and skill." *Id.* at 9. However, the court held that a single act or omission by counsel that is insufficient in itself to contravene the Sixth Amendment nevertheless may satisfy the "cause" prong of the "cause and prejudice" test for excusing a procedural default "if that act or omission resulting in procedural default emanated from ignorance or inadvertence rather than deliberate strategy" (Pet. App. 12).

The court conceded that a "deliberate tactical decision by counsel not to object or appeal a constitutional claim can almost never furnish cause, since matters of trial and appellate tactics are entrusted to the judgment of the lawyer, who acts as the defendant's champion" (Pet. App. 9). In such a case, the defendant could establish "cause" only if the attorney's tactical decision not to object was outside the range of ordinary attorney competence and therefore violated the Sixth Amendment (Pet. App. 12). The court held, however, that a procedural default also may be excused in other cases, even in the absence of a Sixth Amendment violation, "when, through ignorance or oversight, [counsel] fails to exercise [judgment] at all, in dereliction of the duty to represent her client" (Pet. App. 12). In the court's view, the defendant should not be penalized for such a "momentary lapse" by his attorney (*ibid.*).

The court stressed that the question of counsel's "motivation" in failing to preserve the claim was one of fact for the district court to resolve, noting that it lacked testimony from respondent's counsel that might disclose a strategic reason for failing to appeal the *Brady* issue (Pet. App. 14-15). The court accordingly remanded for the receipt of evidence on that question and, if necessary, for a determination whether respondent could demonstrate "prejudice" under the second prong of the "cause and prejudice" test (*ibid.*).[4]

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[3] As this Court made clear in *Evitts* v. *Lucey*, No. 83-1378 (Jan. 21, 1985), slip op. 6, 11, 12-18, a claim of ineffective assistance of appellate counsel actually arises under the Due Process Clause, not the Sixth Amendment.

[4] In remanding, the court rejected the contention that respondent first should be required to exhaust his state remedies with respect to his claim of

b. Judge Hall dissented (Pet. App. 16-22). As an initial matter, Judge Hall disagreed with the majority's view that respondent had actually raised a *Brady* claim at trial, noting that respondent relied only on this Court's decision in *Jencks* when he sought the statements, that he did not object to the trial court's use of an "exculpatory" test when it denied his request, and that he did not mention *Brady* even after trial in his state or federal habeas petitions (Pet. App. 16-18).

Judge Hall next disputed the majority's belief that counsel probably had omitted the *Brady* issue out of inadvertence or ignorance. In Judge Hall's view, the failure to raise a *Brady* issue on appeal "was both tactical and wise, as counsel undoubtedly recognized it as a weak issue" (Pet. App. 19). But more fundamentally, Judge Hall disagreed with the majority's conclusion that mere ignorance or inadvertence on the part of counsel would satisfy the "cause" prong of the "cause and prejudice" test (*id.* at 20):

> I believe that the majority misreads *Wainwright* in concluding such speculative attorney error—error which at worst falls far short of ineffective assistance of counsel—constitutes *Wainwright* cause. Such an extension of the cause standard emasculates the contemporaneous objection rule entirely. Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under *Wainwright*), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the *Wainwright* bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule.

c. On rehearing en banc, the full court of appeals, by a 5-4 vote, reached the same conclusion as the panel, with both the majority and the dissenters relying on the reasons stated in the respective portions of the panel's opinions (Pet. App. 1-2).

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attorney error on direct appeal. The court explained that respondent relied on that error only to establish "cause" under *Wainwright* v. *Sykes* for his failure to preserve the *Brady* issue on appeal, not to establish an independent claim of ineffective assistance of counsel, and that exhaustion of state remedies is not required on the question of "cause" for a procedural default (Pet. App. 14).

SUMMARY OF ARGUMENT

A. Under *Wainwright* v. *Sykes* 433 U.S. 72 (1977), a prisoner bringing a collateral attack on his conviction may be excused from the consequences of failure to raise the claim at trial or on direct appeal only by showing "cause" for that procedural default and "actual prejudice" resulting from it. The court of appeals' holding in this case that "cause" may be established by showing that the failure to raise the issue was due to ignorance or inadvertence by counsel, rather than a conscious and deliberate tactical choice, is flatly inconsistent with *Engle* v. *Isaac*, 456 U.S. 107 (1982). There, the Court held that the fact that counsel might have "overlooked" a claim or been "unaware[ ]" of the basis for it does not constitute "cause" for the procedural default, so long as counsel rendered constitutionally adequate assistance.

B. The Court's rejection in *Engle* of the rationale adopted by the court of appeals in this case was firmly rooted in the origins, nature, and purposes of the "cause and prejudice" standard.

1. In *Fay* v. *Noia*, 372 U.S. 391 (1963), the Court held that collateral attack would be barred by virtue of a procedural default at trial only if the defendant had "deliberately bypassed" the opportunity to raise his claim in the state proceedings. In *Wainwright* v. *Sykes*, the Court abandoned that test and substituted in its place the narrower "cause and prejudice" test. The court of appeals' holding in this case, under which "cause" would be established unless counsel made a deliberate tactical choice not to raise the claim, would reintroduce the deliberate bypass standard that was explicitly rejected in *Sykes*.

Sykes rests on the principle that a constitutional claim may be forfeited in a criminal case by the failure to make timely assertion of that right at trial or on direct appeal and that such a forfeiture is presumptively enforceable in a collateral attack on the conviction in federal court. The existence of a presumptively enforceable procedural default thus turns not on a subjective intent to waive the constitutional claim, as under *Fay* v. *Noia*, but on the occurrence of an objectively verifiable event: whether the defendant complied with a contemporaneous objection requirement or a similar precondi-

tion to preserving a claim. Similarly, under *Sykes* the existence of "cause" to excuse an otherwise enforceable procedural default also turns not on the subjective intent of the defendant or his attorney, but on the existence of an objectively verifiable and external impediment to the defense's developing or presenting the claim—such as the refusal by the trial or appellate court to entertain the claim or the impracticability of raising it, interference by officials with the assertion of the right, or the unavailability at the time of trial or appeal of the factual or legal basis for the claim.

The deliberate bypass rule of *Fay* v. *Noia* was drawn from the standards for determining whether there has been a valid waiver of a constitutional right by the person whose right is at stake. Because the constitutional rights on which counsel might base an objection at trial or on appeal are not personal to the attorney, the court of appeals' requirement that counsel have made a deliberate choice not to raise the claim has no logical nexus to the standard for waiver of constitutional rights on which *Fay* v. *Noia* rested. Moreover, because a lawyer acts on behalf of the accused in a criminal prosecution and the law therefore does not distinguish between the defendant and counsel insofar as compliance with procedural requirements is concerned, there is no basis under *Sykes* for distinguishing between the defendant and his attorney for purposes of determining whether actual knowledge and a deliberate decision are required in order to excuse a failure to comply with such rules.

2. The court of appeals' holding in this case also finds no support in the competing policy considerations that underlie the "cause and prejudice" standard. From the state's perspective, the interest in insisting upon a contemporaneous objection in order to avoid error and assure finality, and to ensure that any needed retrial is promptly held, is fully applicable irrespective of whether the procedural default at trial or on appeal was due to a deliberate decision by counsel or to his ignorance or inadvertence. There also would be substantial costs associated with determining whether counsel actually had made a deliberate tactical choice, because the habeas court would be required to conduct the sort of potentially chilling post-trial inquiry into counsel's tactics and motivations about which the Court was concerned in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 19-20, 27.

Nor does the Court's decision in *Reed* v. *Ross*, No. 83-218 (June 27, 1984), support the court of appeals' rule. The Court there held that "cause" is established if the claim involved was novel at the time of trial. However, whether a claim was not "reasonably available" and therefore was novel under *Reed* v. *Ross* turns on an objective factor external to the defense—the state of the law at the time of trial or appeal—not on the subjective state of mind of the attorney at that time. Moreover, where a claim is not novel, there is a substantial risk that the failure to raise it was tactical. In this case, for example, the fact that counsel initially raised the discovery issue in his statement of issues on appeal suggests that he considered pursuing the point but deliberately deleted it in order to concentrate on more promising issues.

From the standpoint of the defendant, the fundamental fairness of his trial would seem to be little affected by whether a particular claim was lost through counsel's failure to realize its availability and potential merit or through counsel's deliberate (but perhaps unwise) decision not to press the claim. In either event the defendant stands equally convicted, and any possibility that the outcome would have been different had his lawyer acted differently is entirely unaffected by his lawyer's motive (or lack of motive) for failing to assert the claim, as long as the lawyer satisfied the constitutional standards for effective assistance of counsel. As this Court made clear in *Strickland* v. *Washington*, where counsel's performance satisfied these standards, the trial must be regarded as having been fundamentally fair insofar as the role of counsel is concerned.

ARGUMENT

INADVERTENCE OR IGNORANCE SHORT OF INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT CONSTITUTE "CAUSE" FOR EXCUSING A PROCEDURAL DEFAULT

Under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and its progeny, a procedural default that bars litigation of a constitutional claim in state court also forecloses federal habeas corpus relief absent a showing of "cause" for that default and "actual prejudice" resulting from it. The court of appeals held

in this case that a prisoner can satisfy the "cause" requirement by showing that the failure to raise the claim at trial or on appeal was the result of inadvertence or ignorance by his attorney, rather than being a conscious and deliberate tactical decision. This is so, the court held, even though counsel's "momentary lapse" did not cause his performance to fall outside the range of ordinary attorney competence and therefore would not support an independent claim of ineffective assistance of counsel under the Sixth Amendment at trial [5] or under the Due Process Clause on appeal.[6]

As a practical matter, the test announced by the court of appeals amounts to a virtual elimination of the "cause" requirement and a return to the "deliberate bypass" standard adopted in *Fay* v. *Noia*, 372 U.S. 391 (1963). It excuses nondeliberate defaults, not only in the case of those critical decisions that must be made by the client personally, but in connection with any question of trial or appellate strategy or procedure that may result in a default.

Apart from the devastating effect adoption of this standard would have on the effectiveness of procedural default rules in serving their intended purpose, it would also pose serious problems of administration for the habeas court. To begin with, in order to resolve the "cause" issue under the Fourth Circuit's approach, the court on collateral attack would be forced in most if not all cases to conduct a hearing and make difficult determinations regarding counsel's trial and appellate strategy and motives in an attempt to ascertain whether the default that occurred actually was the result of ignorance or inadvertence rather than deliberate choice. Beyond that, however, the "ignorance or inadvertence" standard would not be easy to apply, since there are numerous intermediate positions between complete unawareness of a claim and a deliberate decision not to assert it despite an accurate assessment of its merit. For example, if a lawyer considered making a claim and decided not to do so,

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[5] *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 17-21.

[6] *Evitts* v. *Lucey*, No. 83-1378 (Jan. 21, 1985), slip op. 6, 11, 12-18.

based upon an erroneous judgment that the claim lacked legal merit,[7] does the error amount to "ignorance" excusing the default? If so, there would be few cases indeed in which "cause" could not be shown.

A. This Court's Decision In *Engle* v. *Isaac* Establishes That Inadvertence Or Ignorance On The Part Of Counsel Does Not Satisfy The "Cause" Requirement

The court of appeals' holding in this case, which largely vitiates the "cause" requirement, is directly inconsistent with this Court's decision in *Engle* v. *Isaac*, 456 U.S. 107 (1982). In *Engle*, the Court considered whether "cause" had been established for the habeas petitioners' procedural default in failing to object to a jury instruction that required them to bear the burden of proof on the issue of self-defense. See 456 U.S. at 110-115. The Court stated that in such a case "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum," and the Court acknowledged that "[c]ounsel's default may stem from simple ignorance or the pressures of trial," as well as a "deliberate[]" choice by counsel. *Id.* at 128-129 & n.34. These passages make clear that the Court was addressing defaults that stemmed from ignorance or inadvertence as well as those due to deliberate tactical decisions.

The Court then reviewed the state of the law at the time the habeas petitioners in *Engle* were tried (456 U.S. at 130-133), finding that they did not then "lack[] the tools to construct their constitutional claim" on the burden of proof issue (*id.* at 133). Against this background, the Court concluded (*id.* at 133-134 (emphasis added)):

> We do not suggest that every astute counsel would have relied upon [*In re Winship*, 397 U.S. 358 (1970)] to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims.

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[7] Since a non-meritorious claim would not survive the "prejudice" prong of the "cause and prejudice" test, the "cause" prong is critical to enforcing a default only in the case of claims that would have been upheld had they been properly preserved.

> Counsel might have *overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that *the Constitution guarantees criminal defendants only a fair trial and a competent attorney.* It does not insure that defense counsel will *recognize* and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged *unawareness* of the objection as cause for a procedural default.

In this passage, the Court clearly rejected the contention that counsel's inadvertence (an "overlooked" claim) or his ignorance ("unawareness") of the legal basis for the claim would constitute "cause" excusing the procedural default, at least where the defendant was provided the "competent attorney" that the "Constitution guarantees"—*i.e.*, at least where counsel's omission did not amount to ineffective assistance of counsel under the Sixth Amendment.[8]

The court of appeals' holding in this case simply cannot be squared with the explicit holding of *Engle*. And, indeed, the court of appeals made no effort to do so; it did not even cite or otherwise acknowledge these dispositive portions of the Court's opinion.[9] By contrast, the other courts of appeals that have addressed the question since *Engle* uniformly have held that inadvertence, ignorance or like error by counsel short of constitutionally ineffective assistance does not constitute the "cause" necessary to excuse a procedural default.[10]

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[8] In *Engle*, respondent Isaac argued (Br. 3-4, 8-10, 12) that trial counsel had never considered or perceived the claim; respondent Hughes argued (Br. 14) that there had been no "deliberate" or "strategic" decision by counsel to build reversible error into the case; and respondent Bell argued (Br. 49-52) that inadvertence, ignorance or neglect by counsel, as distinguished from a tactical or strategic decision, should constitute cause.

[9] The court of appeals' only citation to *Engle* was in connection with its discussion of the distinct question of exhaustion of state remedies. See Pet. App. 14 n.8.

[10] See *Cantone* v. *Superintendent, New York Correctional Facility*, 759 F.2d 207, 218 (2d Cir. 1985); *Tsirizotakis* v. *LeFevre*, 736 F.2d 57, 62 (2d Cir. 1984), cert. denied, No. 84-5305 (Oct. 1, 1984); *United States ex rel.*

In reaching its decision here the Fourth Circuit, with virtually no independent analysis of the "cause" requirement, relied exclusively on decisions of other courts of appeals that were rendered *prior* to *Engle* and that no longer are good law even within their own circuits, as shown by subsequent decisions of those courts rendered after *Engle*.[11] The court of appeals' decision here was thus an anachronism when it was rendered and adopted by the en banc court.

B. The Rule Announced By The Court Of Appeals Is Inconsistent With The Origins, Nature, And Purposes Of The "Cause And Prejudice" Standard

The court of appeals' holding that a procedural default may be validly enforced only when the failure to raise or preserve a claim is the product of the lawyer's deliberate tactical

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Caruso v. *Zelinsky*, 689 F.2d 435, 443-444 (3d Cir. 1982); *Wiggins* v. *Procunier*, 753 F.2d 1318, 1321-1322 (5th Cir. 1985); *Weaver* v. *McKaskle*, 733 F.2d 1103, 1106 (5th Cir. 1984); *Long* v. *McKeen*, 722 F.2d 286, 288-289 (6th Cir. 1983), cert. denied, 465 U.S. 1106 (1984); *Webster* v. *Engle*, 721 F.2d 566, 568 (6th Cir. 1983); *Hockenbury* v. *Sowders*, 718 F.2d 155, 160 (6th Cir 1983), cert. denied, No. 83-6218 (May 14, 1984); *Williams* v. *Nix*, 751 F.2d 956, 960 (8th Cir. 1985); *Thomas* v. *Auger*, 738 F.2d 936, 939 (8th Cir. 1984); *Dietz* v. *Solem*, 677 F.2d 672, 673, 675 (8th Cir. 1982); *Matias* v. *Oshiro*, 683 F.2d 318, 321 n.3 (9th Cir. 1982); *Baumann* v. *United States*, 692 F.2d 565, 572 (9th Cir. 1982); *Palmes* v. *Wainwright*, 725 F.2d 1511, 1525 (11th Cir. 1984); *Spencer* v. *Zant*, 715 F.d 1562, 1575 (11th Cir. 1983); *Birt* v. *Montgomery*, 709 F.2d 690, 699 (1983), on rehearing, 725 F.2d 587, 597 (11th Cir. 1984) (en banc), cert. denied, No. 83-6830 (Oct. 1, 1984). Similarly, in *Runnels* v. *Hess*, 713 F.2d 596 (1983), the Tenth Circuit superseded its pre-*Engle* decision in the same case (653 F.2d 1359 (1981)) upon which the Fourth Circuit had relied in the instant case (Pet. 11, 15). See also *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 430-431, 433 n.4 (7th Cir. 1984) (reserving the question whether attorney error short of ineffective assistance can constitute "cause," and finding "cause" because counsel rendered ineffective assistance under Sixth Amendment standards).

[11] The court of appeals in this case relied upon pre-*Engle* decisions of the Fifth, Sixth, Eighth, Ninth and Tenth Circuits. See Pet. App. 10-12, 15. However, as indicated by the citations in note 10, *supra*, each of these courts subsequently discarded its pre-*Engle* view; the Fourth Circuit failed to take note of those developments in either its panel or en banc opinion. Indeed, even the Fourth Circuit previously had appeared to recognize that *Engle* rejected the very rationale adopted in this case. See *Honeycutt* v. *Mahoney*, 698 F.2d 213 (1983); *Wilson* v. *Procunier*, 747 F.2d 251, 252 (1984), cert. denied, No. 84-5852 (Feb. 19, 1985).

choice—and correspondingly that a habeas petitioner can establish "cause" for a procedural default by showing that it was attributable to ignorance or inadvertence by counsel—also is inconsistent with the origins, nature, and purposes of the "cause and prejudice" standard.

1. a. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the Court held that the "cause and prejudice" standard, which previously had been applied in *Davis* v. *United States*, 411 U.S. 233 (1973), and *Francis* v. *Henderson*, 425 U.S. 536 (1976), in the context of the failure to object to the composition of the grand jury prior to trial, should also be applied to other forms of defaults. The *Sykes* Court first described the standard that had been announced in *Fay* v. *Noia*, 372 U.S. 391 (1963), under which a federal district court was to deny relief only if the applicant had " 'deliberately by-passed the orderly procedure of the state courts' " (433 U.S. at 83 (quoting 372 U.S. at 438)). This standard in *Fay* for determining when a defendant was to be bound to a procedural default was drawn from the standard the Court had applied in other contexts for determining whether there had been a binding waiver of a constitutional right such as the right to counsel or to a jury trial—*i.e.*, whether there had been " 'an intentional relinquishment or abandonment of a known right or privilege' " (372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). In the Court's words in *Sykes*, a waiver under *Fay* had to be "knowing and actual" (433 U.S. at 83).

In adopting the "cause and prejudice" standard in *Sykes*, the Court left for resolution in future decisions the precise definition of that standard, except to note that "it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, 372 U.S. 391 (1963), which would have federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." 433 U.S. at 87. It therefore is clear that the Court intended in *Sykes* that the defendant could be held to his procedural default in the original proceedings, and thereby precluded from raising his constitutional claim on collateral attack, even if he was unaware of the claim at the time the forfeiture occurred.

It would be wholly inconsistent with *Sykes* to hold that the habeas petitioner nevertheless may establish "cause" by showing that his default was not due to a knowing and deliberate tactical decision but instead was due to inadvertence or ignorance; to do so would reintroduce the deliberate bypass rule of *Fay* v. *Noia*. Yet that is what the court of appeals has done in this case. The only difference is that the court of appeals' decision focuses on whether the lawyer, rather than the defendant personally, made a deliberate tactical choice. That is not what this Court had in mind in *Sykes*. See Pet. App. 20 (Hall, J., dissenting); *Palmes* v. *Wainwright*, 725 F.2d 1511, 1525 (11th Cir. 1984).

The background and circumstances of *Sykes* certainly do not suggest that the Court intended to preserve the deliberate bypass rule in this manner. See 433 U.S. at 94 (Burger, C.J., concurring). Justice Brennan's dissent in *Sykes* pointed out that there was no basis for inferring that either Sykes *or* his lawyer was even aware of the existence of the Fifth Amendment claim (433 U.S. at 104); by repeatedly focusing on the question (*id.* at 100, 101 n.3, 104, 105, 107, 110, 111, 112, 113, 114 & n.13, 115, 117), the dissent recognized that the logic of the majority's holding would result in the preclusion of federal habeas relief where the procedural default resulted from counsel's inadvertence or negligence. A further confirmation of the intent of *Sykes* in this regard derives from the Court's tracing of the origins of its rule to *Davis* v. *United States* (see 433 U.S. at 84-85), because the Court's opinion in *Davis* indicates (411 U.S. at 243-244) that neither the defendant nor his attorney was actually aware of all the relevant facts bearing on a possible objection to the composition of the grand jury, even though these facts could have been ascertained at the time that Fed. R. Crim. P. 12 required an objection to be lodged. See also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 361-364 (1963).[12]

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[12] Similarly, in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), decided the same day as *Davis*, the Court held that the habeas petitioner had forfeited his right to object to infirmities in the selection of the grand jury even though the relevant facts were found "to have been unknown to both respondent and his attorney" at the time of trial (411 U.S. at 266). See also

b. In any event, the Fourth Circuit's holding in this case is inconsistent with the premises and reasoning of *Sykes*. That decision rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). A forfeiture therefore need not amount to a "knowing and actual" waiver of the opportunity to raise the constitutional claim in state court in order to be enforced by a federal court on collateral attack, as was required under *Fay* v. *Noia*. See 433 U.S. at 83. Under *Sykes*, the procedural default is presumptively enforceable on collateral attack even if it was only a constructive "waiver" that resulted by operation of law from the failure to comply with a procedural provision requiring a claim to be presented at a particular time. The question of an enforceable default thus turns not on subjective intent, but on the occurrence of an objectively verifiable factor: whether the defendant complied with a contemporaneous objection requirement or a similar procedural precondition to preservation of a claim. Both logically and of practical necessity, this rule of forfeiture applies whether or not either the defendant *or* his lawyer actually recognized and considered raising the claim.

Under *Sykes*, relief from an otherwise enforceable forfeiture may be granted in a subsequent collateral attack proceeding only upon a showing of some impediment to complying with the procedural requirement at trial or on direct appeal that constitutes a legitimate and sufficient "cause" for the default. But the absence of actual knowledge and a deliberate decision by either the defendant or his attorney cannot be such "cause"; if it were, the distinction between loss of a claim through a default and the relinquishment or abandonment of a right by a conscious and affirmative waiver would be obliterated. Instead, like the existence of the default itself, the existence of "cause" to excuse the default ordinarily should be determined by reference to objectively verifiable factors that are external to the defense.

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id. at 273-276 (Marshall, J., dissenting); *Estelle* v. *Williams*, 425 U.S. 501, 526 (1976) (Brennan, J., dissenting); *Francis* v. *Henderson*, 425 U.S. at 549 n.2, 550 (Brennan, J., dissenting).

Thus, for example, "cause" for a procedural default would be established by showing that the court refused to entertain an objection or an offer of proof, or that it was not practicable for the defendant to make one (compare *Reece* v. *Georgia*, 350 U.S. 85 (1955), with *Michel* v. *Louisiana*, 350 U.S. 91 (1955); cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465, 489, 494 (1976)), that the default resulted from "incapacity, or some interference by officials" (*Brown* v. *Allen*, 344 U.S. 443, 486 (1953)), that the legal or factual basis for the claim was not "reasonably available" with the exercise of due diligence at the time it was required to have been presented (*Reed* v. *Ross*, No. 83-218 (June 27, 1984), slip op. 15; compare *Davis* v. *United States*, 411 U.S. 233, 243-244 (1973), and *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 363 (1963)), or perhaps that there was a unique feature of the procedural system or the posture of the case that would have made the cost of avoiding the procedural default unacceptably high under the circumstances (*Clay* v. *Director, Juvenile Division, Department of Correction*, 749 F.2d 427, 434-435 (7th Cir. 1984) (Posner, J., concurring); cf. *Sykes*, 433 U.S. at 83 (quoting *Fay* v. *Noia*, 372 U.S. at 440) (noting the defendant's "grisly choice" between accepting a life sentence and pursuing an appeal that might have resulted in a death sentence); see also *Riner* v. *Owens*, 764 F.2d 1253, 1257 (7th Cir. 1985).

There perhaps are some other, exceptional circumstances in which "cause" would be found for a procedural default, consistent with the Court's assurance that the "cause and prejudice" standard will be applied in such a way as to prevent a "miscarriage of justice" (*Sykes*, 433 U.S. at 91). But in providing this assurance the Court surely did not mean to embrace a rule such as adopted by the Fourth Circuit here, which would almost wholly vitiate the enforceability of procedural defaults. Rather, the focus of the inquiry under the principles announced in *Sykes* should remain whether there was a defect in the trial or appellate process that brought about the default or some other external impediment to developing or presenting the claim.

c. It would, moreover, be particularly inappropriate to reintroduce the "knowing and deliberate bypass" standard in the context of counsel's actions. As explained above, the deliberate bypass rule of *Fay* v. *Noia* was drawn directly from the standard for finding a valid waiver of those constitutional rights that may be lost only by an affirmative waiver. Such rights are personal to the accused and therefore cannot generally be waived without the personal participation of the accused. See 372 U.S. at 439. However, the constitutional rights on which counsel might base an objection at trial or on appeal are not personal to the attorney. A rule under which "cause" would be found for a procedural default whenever counsel did not make a deliberate choice to forgo proper assertion of the claim therefore has no logical nexus to the standards for waiver of constitutional rights on which even the deliberate bypass rule of *Fay* v. *Noia* was based. See *Sykes*, 433 U.S. at 93-94 (Burger, C.J., concurring). Accordingly if, as the Court held in *Sykes*, a knowing and deliberate decision by the *accused* no longer is required in order for him to be bound by a procedural default (in the absence of some other sufficient "cause" for that default), it would be perverse to require that the default nevertheless must have been the product of a knowing and deliberate decision by *counsel*, as the court of appeals held.

The Fourth Circuit's rule also distorts the relationship between the accused and his attorney. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U.S. 806, 820 (1975). To be sure, when the defendant chooses to have his lawyer present his case, law and tradition allocate to the lawyer the power to make binding decisions on all but such fundamental matters as whether to plead guilty, waive a jury, testify, or take an appeal. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The lawyer makes those decisions, however, not in his own right, but as the representative of the accused. The defense the lawyer presents therefore is, in contemplation of law, that of the accused personally (*Faretta*, 422 U.S. at 820-821), who is bound by counsel's conduct at trial or on appeal "except where 'the circumstances are

exceptional' " (*Sykes*, 433 U.S. at 91 n.14 (quoting *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965)); see also 433 U.S. at 93-94 (Burger, C.J., concurring); *id.* at 94-95 (Stevens, J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 515 n.4 (1976) (Powell, J., concurring)). Because defense counsel acts on behalf of his client, and because our criminal justice system does not distinguish between the defendant and his attorney insofar as compliance with procedural rules is concerned, there is no legal or logical basis under *Sykes* for a rule that distinguishes between the defendant and his attorney with respect to whether actual knowledge and a deliberate decision is required in order to enforce the consequences of a failure to comply with such rules.

2. For the reasons just discussed, the Court's holding in *Engle* that counsel's unawareness of a legal claim that was available at the time of trial or direct appeal does not constitute "cause" for a procedural default was firmly rooted in the reasoning and purposes of *Sykes* itself. As we now demonstrate, the soundness of that conclusion is reinforced by reference to the policy considerations that animated the Court's substitution of the "cause and prejudice" standard for the "deliberate bypass" test of *Fay* v. *Noia*.

a. *Sykes* identified four substantial reasons for according contemporaneous objection rules at trial a "greater respect" (433 U.S. at 88) than they received under the deliberate bypass standard. First, timely objection may either avert error or at least permit prompt corrective measures and the prevention of further error, "thereby making a major contribution to finality in criminal litigation" (*ibid.*). Second, when an individual is brought to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (*id.* at 90); "[a]ny procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a

verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (*id.* at 89); that collateral attack might occur at a time when successful reprosecution would be more difficult or even impossible. Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88). See also *Engle*, 456 U.S. at 126-131.

In *Reed* v. *Ross*, the Court recognized that similar considerations of finality, efficiency, and the facilitation of prompt retrials apply with respect to procedural rules, such as the Virginia rule in this case, that provide for the forfeiture of claims not raised on direct appeal. The Court accordingly held that the "cause and prejudice' standard applies to appellate defaults as well as trial defaults. Slip op. 9-10. See also *Leroy* v. *Marshall*, 757 F.2d 94, 95 n.1 (6th Cir. 1985) (collecting cases).

With the exception of the "sandbagging" factor, the concerns identified in *Sykes* are fully applicable irrespective of whether the procedural default was due to a deliberate decision by counsel or to his ignorance or inadvertence. In either event, "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's [or appeal's] significance by neglecting to raise a claim in that forum." *Engle*, 456 U.S. at 128-129. Moreover, although sandbagging in itself constitutes a particular affront to orderly procedures because of its deliberate nature, the concrete consequences of sandbagging (piecemeal review and the prospect of a retrial at a much later date) can result just as readily where the procedural default was due to counsel's unawareness. Compare *United States* v. *Agurs*, 427 U.S. 97, 110 (1976).

In addition, there would be substantial costs associated with attempting to identify those circumstances in which there actually had been sandbagging or some other deliberate decision by counsel not to raise the claim at the time required. The court of appeals contemplated (Pet. App. 14-15) that resolution of that issue would require an inquiry into

counsel's "motivation." This in turn presumably would require an evidentiary hearing, often long after trial, including testimony by counsel (if he is still available and has a recollection of the proceedings) regarding his state of mind and tactical judgments.

This Court has recognized the potential adverse consequences for the independence of counsel and the functioning of the criminal justice system that may result from such intrusive post-trial inquiry into counsel's performance. See *Strickland* v. *Washington*, slip op. 19-20, 27. No doubt such an inquiry is sometimes inevitable under *Strickland* when a defendant directly challenges his attorney's actions by bringing an independent, constitutionally based claim of ineffective assistance of counsel. But the Court should hesitate before it adopts a formulation of the "cause" standard that would require an inquiry into counsel's motivation where the attorney's performance is not the ultimate focus of the challenge. These considerations weigh heavily against any rule that makes the existence of "cause" depend on the subjective knowledge and intent of counsel.

The Court did observe in *Reed* v. *Ross* that "the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests" (slip op. 12-13). The "certain circumstances" with which *Reed* v. *Ross* itself was concerned involved a constitutional claim that was novel at the time of trial but established as meritorious by the time of the collateral attack proceeding, and the Court held that "cause" exists in such a case if counsel had no "reasonable basis" upon which to formulate the constitutional claim and it therefore was not "reasonably available" to him. *Id.* at 13-15. Resolution of that question turns not on the state of mind of the attorney, but on the state of the law at the time of trial, which is an objective external factor. See *id.* at 15-18. Compare *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982). The Court in *Reed* v. *Ross* did not question the holding in *Engle* that counsel's actual unawareness of a legal claim that *was* reasonably available at the time of trial does not constitute "cause."

Nor does the Court's reasoning in *Reed* v. *Ross* support the court of appeals' holding in this case. First, the Court observed that in the case of a novel claim "it is safe to assume that [counsel] is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any kind." Slip op. 13. A court obviously cannot have the same confidence where a habeas petitioner asserts that his attorney simply overlooked or was unaware of the legal basis for a claim that was reasonably available at the time of trial and had been identified and raised by other lawyers. See *Engle*, 456 U.S. at 133-134. Indeed, as Judge Hall observed in his dissent (Pet. App. 16-18), there is every reason to believe that counsel's actions in this case were deliberate. The fact that counsel requested disclosure of the statements at trial and initially identified the discovery issue in the notice of appeal strongly suggests that there subsequently was a conscious choice to abandon that issue in order to concentrate on what might have seemed to be more promising claims. See *Jones* v. *Barnes*, 463 U.S. at 751-754. It is hard to fault this judgment. Although respondent and the court of appeals now characterize the issue as a *Brady* claim, counsel's request at trial appears to have been a nonconstitutionally based discovery request relying on the rationale of *Jencks* (see Pet. App. 17 (Hall, J., dissenting)), and his statement of the issue in the notice of appeal was not framed in constitutional terms (*id.* at 5). Counsel might have concluded that the prospects of success on the discovery issue were not promising under state law. This is doubly so viewing the matter in *Brady* terms; counsel could well have concluded that the witness statements were unlikely to include any evidence that was material and favorable to respondent, especially since the trial court had reviewed the statements in camera prior to trial and concluded that they contained nothing exculpatory.

Second, the Court in *Reed* v. *Ross* explained that a rule requiring counsel to raise a novel question would serve little functional purpose, because the novelty of the claim would probably lead the court to reject it. Slip op. 13-14. By contrast, where a claim is not novel, there is every reason to believe that the court may be receptive if the claim is in fact

meritorious. A rule that does not excuse a procedural default based on mere inadvertence or ignorance reinforces counsel's duty and incentives to be vigilant at the trial itself and on direct appeal in bringing any such issues to the court's attention.[13]

b. The countervailing considerations that also "have come to be embodied in the 'cause and prejudice' requirement" (*Reed* v. *Ross*, slip op. 9) likewise do not support the court of appeals' holding. Those considerations are (1) the prisoner's interest in having a federal forum for the presentation of his claim (*id.* at 8) and (2) the role of the writ of habeas corpus as "a bulwark against convictions that violate 'fundamental fairness' "(*Engle*, 456 U.S. at 126, quoting *Sykes*, 433 U.S. at 97 (Stevens, J., concurring)).

Acknowledgment of a state defendant's abstract interest in presenting his claim to a federal forum if it fails in state court offers little guidance in giving content to the "cause" standard. That interest is certainly exceedingly limited, if not nonexistent, when the defendant was not sufficiently interested in his federal constitutional claim even to raise or preserve it during the state proceedings. In any event, it seems most unlikely that the prisoner's interest in presenting a defaulted claim to a federal forum is much affected by whether his lawyer's failure to raise and preserve the claim in state court was due to a deliberate tactical decision or to ignorance or inadvertence.

That distinction also has no bearing on the fundamental fairness of the conviction—at least where, as the court of appeals necessarily assumed in this case (Pet. App. 9), the attorney's performance satisfied constitutional standards of effective assistance of counsel. This conclusion is demonstrated by positing a situation involving two defendants convicted at a joint trial in which an error occurred that equally affected both. Suppose the attorney for one defendant recognized the

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[13] The Court also was concerned in *Reed* v. *Ross* that a holding that required counsel to raise even claims having a novel legal basis would lead to too many objections by counsel at trial or to the cluttering of appellate briefs with far-fetched claims, in order to avoid procedural defaults. Slip op. 14. This concern likewise has no application where there is a reasonable basis for the argument in existing law.

error and considered raising an objection but declined to do so for tactical reasons, while the attorney for the other either failed to notice the error or was unaware of the legal basis for an objection. If actual prejudice could be shown to have resulted from the error, then under the Fourth Circuit's holding, the second defendant would be entitled to federal habeas relief but the first would not. Yet it cannot seriously be contended that the fundamental fairness of the two convictions is significantly different—or that one defendant, but not the other, is suffering from a "fundamentally unjust incarceration" (*Engle,* 456 U.S. at 135) entitling him to access to a federal forum—simply because their attorneys had different subjective states of mind when the error occurred at trial. This Court has stressed that the definition of the terms "cause" and "prejudice" must be informed by the role of the writ of habeas corpus in preventing miscarriages of justice. *Engle,* 456 U.S. at 135; *Sykes,* 433 U.S. at 91. Because counsel's state of mind has no direct relation to whether a miscarriage of justice has occurred, the existence of "cause" should not turn on that factor.

This does not mean, of course, that the accused in a criminal prosecution has no protection against errors by his attorney. In *Strickland* v. *Washington,* this Court for the first time announced standards to govern the determination whether counsel has rendered the effective assistance required by the Sixth Amendment. Compare *Sykes,* 433 U.S. at 117-118 (Brennan, J., dissenting). If the defendant can show that counsel's performance, including his failure to raise or preserve an objection, was not within the range of reasonable competence demanded of attorneys in criminal cases (*Strickland,* slip op. 17-21) and that there is a reasonable probability that any errors by counsel affected the outcome of the trial (*id.* at 24), he is entitled to habeas relief on an independent claim of ineffective assistance of counsel. But if counsel's performance was constitutionally effective under these standards, the trial must be regarded as having been fundamentally fair insofar as the role of counsel is concerned. *Id.* at 14-17, 19, 23-24, 26, 30; *United States* v. *Cronic,* No. 82-660 (May 14, 1984), slip op. 4-9. In that event, the habeas

court should look elsewhere than to counsel's performance in ascertaining whether the conviction was fundamentally fair. Moreover, any attempt to identify the types of errors by counsel that do not rise to the level of constitutionally ineffective assistance but nevertheless do amount to "cause" for a procedural default would lead to the very confusion concerning the appropriate standards for evaluating attorney performance that this Court's decision in *Strickland* had served to eliminate.

For the foregoing reasons, the Court should adhere to its view in *Engle* that counsel's overlooking of a claim or his unawareness of the legal basis for the claim does not constitute "cause" for a procedural default, at least if the defendant received the effective assistance of counsel that the Constitution guarantees.[14]

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[14] Because the court of appeals in this case assumed that respondent's attorney did not render ineffective assistance of counsel, there is no occasion for the Court to decide in this case whether counsel's failure to raise or preserve an objection constitutes "cause" where his omission was sufficiently egregious to amount to ineffective assistance of counsel under Sixth Amendment standards. Some courts of appeals have held or suggested that "cause" would be established in such circumstances. See, *e.g.*, *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d at 430-431; *Tsirizotakis* v. *LeFevre*, 736 F.2d at 62; *Birt* v. *Montgomery*, 709 F.2d at 699; *Baumann* v. *United States*, 692 F.2d at 572; *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d at 443-444. The Fifth Circuit has held to the contrary. *Wiggins* v. *Procunier*, 753 F.2d at 1321-1322; *Weaver* v. *McKaskle*, 733 F.2d at 1106. The outcome should be the same under either approach, because the standard for evaluating the attorney's performance would be the same for purposes of showing "cause" as it would be for purposes of establishing a Sixth Amendment claim of ineffective assistance of counsel, and because the habeas petitioner must establish actual prejudice whether he is attempting to overcome a procedural default caused by counsel or seeking relief on an independent claim of ineffective assistance of counsel.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

CHARLES FRIED
Acting Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney

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